LEE TJIN NAM @ GEORGE LEE CHIN NAM

v.

LIE CHIN MAN

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
TUAN TEE AH SING JC
[CIVIL SUIT NO. K22-156 OF 1994]
24 JULY 1995

PROBATE & ADMINISTRATION: *Executor seeking to propound will of deceased dated 6 July 1993 - Will made two months before deceased's death - Will made during deceased's stay in hospital for end stage renal failure - Defendant opposing grant of probate - Whether deceased knew and approved of the contents of the will at the time of its execution - Whether deceased was of sound mind, memory and understanding at the time she made the will - Whether execution of the will was obtained by undue influence and/or fraud.*

EVIDENCE: *Conflict of evidence between plaintiff and defendant - Witnesses present during material time not called to give evidence - Whether adverse inference to be drawn against plaintiff - Consideration of s. 114(g) Evidence Act 1950.*

The plaintiff, as executor, sought to propound the last will of the late Lim Soen Moei (the deceased) which will was dated 6 July 1993. The will was made about two months before the deceased's death. The evidence adduced was to the effect that the will was executed by the deceased while she was in hospital with end stage renal failure.

The defendant, the youngest son of the deceased, opposed the grant of probate to the plaintiff on the grounds that at the time of execution of the will the deceased did not know and approve of the contents of the will. In the alternative the defendant claimed that the deceased was not of sound mind, memory and understanding at the time she made the will. The defendant also alleged that the execution of the will was obtained by the undue influence and/or fraud of the plaintiff and/or one Lie Chin Kwet who is the alternate executor named under the will.

In the circumstances the defendant prayed, by way of counterclaim, that the Court pronounce that the will dated 6 July 1993 to be invalid and that the deceased's will dated 2 October 1990 to be the true last will of the deceased.

Held:

[1] In this case the burden of proving testamentary capacity lies on the plaintiff. The plaintiff has to prove that the deceased was of sound mind, memory and understanding and that she approved of and had knowledge of the contents of the will when she executed it. When the will was executed the deceased was 79 years old, had been readmitted to the Queen Elizabeth Hospital and was diagnosed to be suffering from end stage renal failure secondary to long standing diabetes mellitus. Furthermore it was clear from the evidence adduced that the lawyer who prepared the will (PW4) did not obtain or receive any instructions directly from the deceased as the instructions regarding the preparation of the will were related to him by the plaintiff.

[2] In the light of the evidence of DW2, an independent witness whose credibility was not shaken in cross-examination, that when he met the deceased at the hospital, the deceased

started asking questions on the implications of the will, and that the deceased made remarks in Hakka saying words to the effect that when the will was made there were a lot of people in the room and she was quite in a daze, it was clear that the deceased did not know or was not aware of the full contents and implications of the will when she executed it on 6 July 1993.

[3] PW4 admitted in cross-examination that the provisions under clauses 4 and 5 of the will were inserted by him without the authority or instructions of the deceased. By inserting clause 5, PW4 has by his action deprived the defendant from benefiting under the deceased's will and he did not consult the deceased whether she required such provisions to be made in her will or not. Although PW4 stated that he explained the contents of the will to the deceased and the deceased acknowledged that she understood, in view of the weak mind the deceased was in, she did not know the nature of the document she was executing.

[4] The plaintiff could have called several witnesses to support his testimony, especially his sister, Lie Chin Moy or his brother, Lie Chin Kwet to corroborate him regarding the message conveyed by them that the deceased wanted to make a will. The failure to call them draws an adverse inference under s. 114(g) of the Evidence Act 1950 that if they had been called as witnesses, their evidence would have been unfavourable to the plaintiff.

[5] There were several suspicions surrounding the making of the will and the plaintiff had failed to remove the suspicions. In the circumstances the plaintiff must necessarily fail and the will dated 6 July 1993 must be pronounced to be invalid. By the same token the will dated 2 October 1990 has been proved and must be pronounced to be the true last will of the deceased.

[Orders accordingly].

Cases referred to:
Udham Singh v. Indar Kaur [1971] 2 MLJ 263 ***(refd)***
Bank v. Goodfellow [1870] LR 5 QB 565 ***(refd)***
Harwood v. Baker 3 Moo PC 29 ***(refd)***
Battan Singh v. Amirchand [1948] 1 All ER 152 ***(foll)***
Barry v. Butlin [1838] 2 Moo PCC 480 ***(refd)***

Legislation referred to:
Sabah Wills Ordinance (Cap. 158) s. 2
Evidence Act 1950 s. 114(g)

For the plaintiff - David Fung; M/s. Alex Pang & Co.
For the defendant - Norbert Yapp (Feona Jinu with him); M/s. Jayasuriya Kah & Co.

JUDGMENT

Tee Ah Sing JC:

This is an action by Lie Tjin Nam @ George Lee Chin Nam, the plaintiff who is the executor appointed under the last will of the late Lim Soen Moei (the deceased) dated 6 July 1993 seeking to propound in this Court the last will of the deceased dated 6 July 1993 (P2). The deceased died on 31 August 1993 at Kota Kinabalu in the state of Sabah. The will dated 6 July 1993 was made about two months before the deceased's death.

The defendant claims that he is the sole beneficiary of the residue of the estate of the deceased under an earlier will dated 2 October 1990 (AB2) made by the deceased.

The defendant who is the youngest son of the deceased relied on three main grounds for opposing the grant of probate to the plaintiff as follows:

(1) that at the time of execution of the will the deceased did not know and approve the contents of the will.

(2) Alternatively, that the deceased was not of sound mind, memory and understanding at the time she made the will.

(3) In the further alternative, that its execution was obtained by the undue influence and/or fraud of the plaintiff and/or one Lie Chin Kwet who is the alternative executor named under the will.

By way of a counterclaim the defendant prays that this Court do pronounce in his favour the earlier will of the deceased dated the 2 October 1990 (AB2).

On the other hand the plaintiff contended that the deceased was of sound mind when she made P2 and that the deceased approved and had knowledge of the contents of the will.

The plaintiff (PW1) in his examination-in-chief stated that on 28 June 1993 he received telephone call from one of his younger brothers (Lie Chin Kwet) and one of his younger sisters (Lie Chin Moy). Both of them told him that their mother wished to make a will.

So in the afternoon the plaintiff went to the Queen Elizabeth Hospital Kota Kinabalu (QEH) and asked his mother (the deceased) whether she would like to make a will. And the deceased told him that she wished to make a will. And the deceased also said that he being the eldest and she asked him to proceed to do the will. The deceased told him to give the 10% shares and her other properties to the nine children other than the defendant. The deceased did explain to him that the defendant was already given 10% share.

He was satisfied that the deceased was normal talking like ordinary people.

After the plaintiff received the instruction, on the second day he went with Lie Chin Kwet to engage Mr. Ken Chiam (PW4) to prepare the will. The plaintiff also told PW4 that the deceased was sick and was in QEH.

PW4 agreed to do the will.

The plaintiff further stated in evidence that his sister, Lie Chee Hiong who lives in Tawau told him she did not want her name to be put into the will.

After getting the names and I/C numbers of the 8 children the plaintiff together with his younger brother, Lie Chin Kwet went to see PW4 again. At this second meeting he gave PW4 the names and I/C numbers of the 8 children and also the photostated copy of the 10% shares.

According to the plaintiff he did tell the deceased that Lie Chee Hiong did not want her name to be included in the will. And the deceased said if Lie Chee Hiong did not want to have her name to be included just leave it.

In the afternoon of 6 July 1993 PW4 did tell the plaintiff that he will be going to QEH after his office hours.

So on that day the plaintiff went to QEH and waited for PW4 and Mr. Ho Chee Tend (PW5).

So the three of them went into the room where the deceased was in. At that time the deceased was normal.

When they entered the room PW4 had an ordinary talk with the deceased.

The plaintiff further stated that on the day of the execution of the will the deceased could also recognise all her children. The plaintiff also stated that PW4 told him that those who have the name in the will cannot stay in the room. When the will was executed the plaintiff was not in the room.

In cross-examination the plaintiff agreed that the deceased left his house in 1992 because she had something not in good terms with his wife.

The plaintiff also stated that the defendant had been in QEH to scold the deceased and force her to sign the 10% shares to the defendant. The deceased did mention to the plaintiff that the defendant forced her to give the 10% shares. The deceased also said "I better die. All my property lost".

He agreed that prior to July 1993 the deceased did go to QEH for kidney treatment.

The plaintiff also stated that he was told by the deceased the defendant scolded her gave her pressure because the defendant knew the deceased was going to do a will. Regarding with doing the will Lie Chin Moy did tell the defendant. This was told to the defendant before the will was made.

He further stated that Lie Chin Moy and a servant knew the defendant scolded the deceased.

That was why half of the share the deceased did not give to the defendant but to the 8 children because the defendant was not good with the deceased.

When his younger brother and younger sister told him that the deceased wanted to make a will it was more or less one week before making the will. And that day was on Monday.

He could not remember whether it was his suggestion or not to put in the name of the alternative executor, Lie Chin Kwet. He also cannot remember whether it was Lie Chin Kwet's suggestion.

He was aware that the deceased was readmitted to QEH on 6 July 1993 due to the seriousness of her sickness.

At around 3.30 p.m to 4.00 p.m the plaintiff went to QEH and told the deceased that Mr. Ken Chiam (PW4) would be coming to do the will. At that time the defendant was also there.

After the will was done the original copy of the will was given to the plaintiff. Lie Chin Kwet paid the legal fees of RM300 for the will.

One week after the will was done, one day when he was at the living room in QEH the defendant asked him to go the deceased's room together. The defendant asked him to ask the deceased to transfer the 10% share to the defendant. The deceased disagreed with that.

The deceased said not to disturb her because she has already given the 10% share to the 8 children. At that time Lie Chin Moy and Liow Yun Lan were also present.

After the plaintiff left the transfer was done.

In re-examination the plaintiff stated that on or about 28 June 1993 he received a telephone call from Lie Chin Moy who told him that the deceased wanted to do a will and asked him to look for Lie Chin Kwet. He did telephone Lie Chin Kwet who also said that the deceased wanted to do a will. Plaintiff's share in the will is 1/8.

Dr. Ronald David Jallah (PW2) is a consultant physician at QEH. P1 is the medical report on a patient named Lim Soen Moei (the deceased) dated 6 September 1994. According to P1 on 6 July 1993 the deceased was admitted again with uraemia and fluid overload.

In his examination-in-chief PW2 stated that diabetes mellitus is a desease where in the long term this will result in the failure of the kidney to perform its normal function that is end stage renal failure. By end stage renal failure he meant that the renal function is less than 10% of normal function and this is irreversible.

The first time he managed the patient was at the specialist out patient clinic on 16 September 1992. Between 16 September 1992 and 6 July 1993 she had nine admissions in the hospital.

She was admitted on 15 June 1993 with the problem of difficulty in breathing and was found to have fluid overload. She was discharged on 2 July 1993 after peritoneal dialysis.

Fluid overload is one of the features of uraemia.

PW2 did not see the patient on 6 July 1993. He saw the patient on the morning of 7 July 1993. To the best of his memory the patient was conscious and orientated. By orientated it means that the patient was aware of person, time and place. She could answer simple questions appropriately. She was discharged on 31 July 1993.

Under cross-examination PW2 stated that the patient had end stage renal failure. She had renal failure from 1992 onwards until her death. Renal failure can cause an impairment of concentrating ability. Renal failure can also cause drowsiness and insomnia.

In-re-examination PW2 stated that by orientation it is meant awareness of person, time and place.

Dr. Georgy a/l Chacko (PW3) is a medical officer at the QEH. He stated in evidence that he attended to a patient by the name of Lim Soen Moei (the deceased) a number of times.

On 28 June 1993 he saw her. He has noted that her general condition was stable and that she had no difficulty in breathing.

On 6 July 1993 he saw her. He stated that according to the admission form she was admitted at 9.30am on 6 July 1993. The patient was admitted with difficulty in breathing. He has noted that she was slightly drowsy and was breathless. When he says that a person is drowsy it means that the person is sleepy and is arousable from sleep.

He saw her on 7 July 1993. He has noted that she was better on that day.

His impression was that she had a commanding nature. In cross-examination PW3 stated that in his notes he has mentioned that she was readmitted through the casualty. It usually is meant for emergency cases.

It was on 6 July 1993 that she was readmitted through the casualty ward. The entry that he has made on 6 July 1993 is that the patient is slightly drowsy and breathless. The other entry was that she had fluid in the lungs that would explain why she had difficulty in breathing.

He has also noted his impression of the patient at that time which was end stage renal failure with fluid overload.

Ken Chiam (PW4) in his evidence stated that he has been a practising lawyer for about 9 years. P2 was not the first will drawn by him. Before this one maybe between 30 to 50 wills he has done.

On 6 July 1993 PW4 went to QEH at about 4.30 p.m. Mr. Ho Chee Tend (PW5) also went to QEH.

Then the plaintiff PW4 and PW5 proceeded to the room where the deceased stayed.

On entering the room PW4 saw the deceased was seated upright in bed. She was conversing quite loudly in Hakka with a group of people in the room. PW4 greeted her by saying in Hakka.

PW4 spoke to her generally and told her that the plaintiff had told him that she wanted to make a will and that the plaintiff had come to see him for this purpose. And he had for this reason prepared one for her. She nodded her head and said yes in Hakka.

He found that she appeared to him to be conscious and aware of what was going on at that time. During the general conversation he was observing her mental state of mind and he found that since she was able to converse with anyone in the room she therefore appeared to him to be normal.

If he did not see what he saw or heard he would have spoken to the doctor in charge of her.

She appeared to him to be conscious and aware of her surroundings. In the general conversation she could answer his questions coherently and appropriately.

PW4 then requested people in the room with the exception of four to leave the room.

After that PW4 and PW5 got closer to the deceased.

PW4 explained to the deceased the purpose of a will in Hakka. She nodded her head.

PW4 then proceeded to read out the contents of the will in Hakka to her. At the end he asked her whether she understood what he had read and whether she agreed or approved to what he read to her. Her response was yes and she said “these are my children each and everyone of them is entitled to a share of my property.”

PW4 was satisfied that she understood and agreed to the contents of the will after he has read to her otherwise she would not have said these are my children each and everyone of them is entitled to a share of my property.

He did explain to her that she intended to give her property to the children as itemised in clause 4 and clause 5 of the will.

Having found that she knew what he had said and agreed to what he said he requested her to thumb print on the will which she willingly agreed with his assistance.

She was not pressurised by anyone to thumb print on the will.

After she had thumb printed the will PW4 put his signature on the will as a witness to the will. PW5 also put his signature on the will as a witness.

In cross-examination PW4 agreed that this was the first time he prepared a will for a person to be executed in hospital. PW4 also said that he knew Lie Chin Kwet as Lie Chin Kwet had in 1992 instructed his firm to issue some letters of demand for the company. Lie Chin Kwet did not retain his firm as a solicitor for any matter.

The plaintiff did not tell him that the deceased wanted to change the will nor did the plaintiff informed him that the deceased had previously made a will.

PW4 did not at any time ask the plaintiff whether the deceased had previously made a will.

Prior to the will been drafted PW4 had not made arrangements to see or meet the deceased. PW4 agreed that he never received direct instructions from the deceased.

PW4 also stated that the last conversation he had with the plaintiff over the telephone was on 6 July 1993 but the plaintiff did not tell him that the deceased had just been readmitted to hospital.

PW4 was not aware that the deceased has just been readmitted to hospital.

PW4 disagreed that she was not capable of understanding what he said.

PW4 also disagreed that the plaintiff must be present during his explanation to her of the contents of the will.

PW4 further said that when she said "these are children" she meant the children as referred to in the will.

It could possibly be PW4's suggestion that Lie Chin Kwet be the alternate executor.

It could possibly be PW4's suggestion that clause 5 be included in the will.

It could also be a clause PW4 put in the will in case of any property being left out as this is a common clause to all wills. Clause 5 is a residuary clause.

In re-examination PW4 stated that he thought it would be prudent of him to insert a residuary clause as reflected in clause 5 of P2 in case of any possibility that some or any property being left out. He would have thought that it was possible that since the deceased's instructions were related through the plaintiff it would be more prudent to have this clause inserted. After he read clause 5 of P2 to the deceased, he formed an opinion that she fully understood and agreed.

Ho Chee Tend (PW5) confirmed that on 6 July 1993 he went to the Queen Elizabeth Hospital. *a*

He saw that the deceased was seated upright on the bed. She appeared to him to be fully awake and normal. He saw her conversing with some people inside the room.

Later he saw PW4 holding up a copy of the will and explaining the contents of the will to the deceased in Hakka. He saw the deceased nodding her head frequently in response to what PW4 explained to her. *b*

After PW4 had explained the contents of the will to the deceased, PW4 then asked her whether she understood the will and whether she agreed to the will. She responded by nodding her head in approval.

PW5 saw the deceased put her thumb print to the will. *c*

PW5 signed as a witness on the will. PW4 also put down his signature on the will.

In this case the burden of proving testamentary capacity lies on the plaintiff. (See *Udham Singh v. Indar Kaur* [1971] 2 MLJ 263).

d

What is meant by testamentary capacity is clearly explained in *Udham Singh v. Indar Kaur* [1971] 2MLJ 263 where at page 264 and 265. His Lordship Ismail Khan C.J (Borneo) said:

> A person has testamentary capacity when he understands the nature of his act and its effect; the extent of the property of which he is disposing; the claims to which he ought to give effect; and, with a view to the latter object no disorder of the mind must poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties, and no insane delusion must influence his will in disposing of his property, and bring about a disposal of it, which if the mind had been sound,would not have been made (*Banks v. Goodfellow* [1870] LR 5 QB 565). *e*

The expression "sound and disposing mind and memory" is discussed and defined in *Banks v. Goodfellow* [1870] LR 5 QB at pages 568 and 569 where following *Harwood v. Baker* (3 Moo PC at page 291) it is stated that "in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom by his will he is excluding from all participation in that property. *f*

g

In other words the plaintiff has to prove that the deceased was of sound mind, memory and understanding and that she approved of and had knowledge of the contents of the will when she executed it.

When the will (P2) was executed on 6 July 1993 the deceased was 79 years old. The deceased was readmitted to QEH through the casualty ward on that day. According to the Consulting Physician (PW2) the deceased was diagnosed to be suffering from end stage renal failure secondary to long standing diabetes mellitus. Between 16 September 1992 and 6 July 1993 the deceased had 9 admissions in the QEH. In P1 it is also stated that on 6 July 1993 the deceased was admitted again with uraemia and fluid overload. *h*

Dr. Georgy a/l Chacko (PW3) stated in evidence that on 6 July 1993 he saw the deceased. He stated that according to the admission form she was admitted at 9.30 am. She was admitted with difficulty in breathing. She was slightly drowsy and was breathless. The deceased had *i*

uraemia and fluid overload. He also stated that emergency cases are brought through the casualty ward.

I find as a fact that Mr. Ken Chiam (PW4) the lawyer who prepared the said will (P2) did not obtain or receive any instructions directly from the deceased. PW4 also did not bring a draft copy of the said will and show it to the deceased prior to 6 July 1993 for her approval.

PW4 admitted that the instructions regarding the preparation of the will were related to him by the plaintiff.

We also have the evidence of the defendant that the deceased had made two earlier wills, namely AB1 and AB2.

In AB1 dated 12 February 1988 the defendant is the executor and sole beneficiary whereas in AB2 dated 2 October 1990 Lie Chin Tien (DW3) is named as the executor. The testator gave one-half share in Kota Kinabalu Town Lease No. 017527534 to the defendant and DW3 in equal shares. By clause 4 of AB2, the residue of the estate is given to the defendant.

The deceased has 10 surviving children and that only 8 of them were named as beneficiaries in P2.

Ho Toh Chee (DW2) in cross-examination stated that when he met the deceased at QEH the deceased started asking question on the implication of the last will. According to DW2 the questions the deceased posed to the defendant were how many peoples were getting the 10% share. DW2 also recalled one question she asked whether the new comer to the 10% will also have the rights to claiming part of the Seasons branch which is operated by her younger son Lie Chin Tien (DW3). DW2 also said the deceased asked the defendant "where were you when the will was been made." And the defendant answered "I was not informed."

DW2 also stated that after a while the deceased made remarks in Hakka saying words to the effect that the will was made, that there is a lot of people in the room and she was quite in a daze. She did claim to know that she had executed certain things.

I find that DW2 is an independent witness. I find that he is a reliable witness whose credibility was not shaken in cross-examination.

I find as a fact that the deceased did not know or was aware of the full contents and implications of the will when she executed it on 6 July 1993.

In this case the defendant has stated in evidence that during one telephone conversation will Lie Chee Hiong from Tawau, Lie Chee Hiong told him that the deceased told Lie Chee Hiong that the deceased was unaware that she had given her remaining 10% shares to 8 children not 10. Since Lie Chee Hiong was not called as a witness whatever was told by Lie Chee Hiong to the defendant is hearsay evidence and is inadmissible.

Mr. Ken Chiam (PW4) has stated in evidence that after he explained the will to the deceased, the deceased said "These are my children. Each and everyone of them is entitled to a share of my property". In cross-examination PW4 said that when she said the words she meant the children as referred to in the will.

When she said those words I am of the view that she was not aware that in the will there were only 8 beneficiaries and not to all her 10 children in which case there was a misapprehension of facts by the deceased.

PW4 has admitted in cross-examination that the provisions under clauses 4 and 5 of the will were inserted by him without the authority or instructions of the deceased. By inserting clause 5 in the will, PW4 has by his action deprived, the defendant and Lie Chee Hiong from benefiting under the deceased's will. PW4 did not consult the deceased whether she required such provisions to be made in her will or not. Further under s. 2 of the Sabah Wills Ordinance (Cap. 158) "will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. In view of this provision PW4 should have had an interview with the deceased to obtain her "declaration of intention" before he prepared the will for execution.

Although PW4 has stated in evidence that he has explained the contents of the will to the deceased and the deceased acknowledged that she understood in view of the weak mind the deceased was in on 6 July 1993, I find that the deceased did not know the nature of the document she was executing.

From the evidence of the defendant it is clear that AB1 and AB2 were prepared by the same lawyer, Mr. Leong Funk Chiew whereas the present will (P2) was prepared by Mr. Ken Chiam (PW4) who had no dealings with the deceased previously and who had no knowledge of the contents of AB1 and AB2.

At this stage it is relevant to refer to the case of *Battan Singh v. Amirchand* [1948] 1 All ER 152 where Lord Normand at page 156 said:

> It is relevant to note that he failed to employ the solicitor who had acted for him on previous occasions or even to ask him to send the previous wills or copies of them, for these are precautions which a testator of sound mind who deliberately intended to alter his will and to disinherit his near relations would naturally take. The result was that he obtained the services of a solicitor unacquainted with his family affairs and unable to judge whether he had the capacity to make a will with due regard for the claims of his nephews for whom he had till the closing days of his life always felt a warm affection.

Applying the aforesaid in our case, I find that the deceased was not of sound mind memory and understanding when she executed P2.

Further the evidence of DW2 and DW3 confirm the defendant's testimony that the deceased had all along intended the defendant to inherit her estate after her death. The deceased had revealed this to DW2 who is the auditor of the company. DW3 has testified that the deceased's share will be given to the defendant.

I disbelieve the evidence of the plaintiff that the defendant scolded the deceased. The plaintiff has not adduced any credible evidence as to why the deceased wanted to exclude the defendant from her last will. When in her earlier wills, AB1 the defendant was the sole beneficiary and in AB2 the defendant and Lie Chin Tien (DW3) were the beneficiaries.

In *Battan Singh v. Amirchand* [1948] 1 All ER 152 it was held that if at the time of making his will a testator was through disease so deficient in memory that he was oblivious of the claims of his relatives and if that forgetfulness was an inducing cause of his choosing others, to be his legatees his will is invalid.

I think this ruling exactly fits the circumstances of this case. The deceased was oblivious to the defendant's claims owing to her memory being deficient through illness and it was her deficiency in memory that caused her to omit the defendant from her last will.

I shall now with the question whether the will was procured by the undue influence and/or fraud of the plaintiff and/or Lie Chi Kwet.

In *Barry v. Butlin* [1838] 2 Moo PCC 480 at page 482 and 483 where His Lordship Mr. Baron Parke said:

> ...if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicions of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

In *Tyrrell v. Painton* [1894] P. 151 Lindley L.J says (p. 157):

> The rule in *Barry v. Butlin* 2 Moo PC 480, *Fulton v. Andrew* LR 7 HL 448 and *Brown v. Fisher* 63 LT 465, is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist and whatever their nature may be, it is for those who propound the will to remove such suspicions, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on these who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will.

The defendant and Lie Chee Tien (DW3) have testified that way back in 1965 the plaintiff had misappropriated his late father's property by transferring the ownership of the business to himself without the consent or knowledge of his late father resulting in the late father denying him of any inheritance from the family fortune. Another occasion where the plaintiff has shown his greed was when he deceived DW3 into parting with the sum of Canadian Dollars 10,000 to him on the pretext that the defendant had requested for a loan of Canadian Dollars 30,000 from him when in actual fact the defendant had only requested for a loan of Canadian Dollars 20,000 from him. According to the defendant when this fraud was subsequently discovered the deceased had asked the defendant to get the plaintiff to repay the outstanding amount and the amount was repaid through stocks taken from the plaintiff's shop.

In view of the plaintiff's past misdeeds the learned Counsel for the defendant submitted that it is unlikely that the deceased would have desired the plaintiff to be her executor. I agree with this contention.

Lie Chin Kwet paid for the legal fees in respect of the making of the will. There is also provision in the will that he is made the alternative executor.

We have the evidence of DW2 that Mr. Lie Chin Kwet did seek his advice as to whether he could cancel the will. All these go to show that Lie Chin Kwet had a hand in the procurement of the will.

It is noteworthy that despite the seriousness of the allegations made in the statement of defence as well as at the trial Lie Chin Kwet was not called by the plaintiff to rebut the testimony of the defendant.

The plaintiff has stated in his examination-in-chief that on 28 June 1993 he was told by his younger sister Lie Chin Moy that the deceased wanted to make a will. And in re-examination

the plaintiff stated that on 28 June 1993 he received a telephone call from Lie Chin Moy who told him that the deceased wanted to make a will and asked him to look for Lie Chin Kwet. The plaintiff telephoned Lie Chin Kwet who also said to him that the deceased wanted to do a will. These two persons would be material witnesses for the plaintiff.

However the plaintiff did not call Lie Chin Moy or Lie Chin Kwet to corroborate him regarding the message conveyed by them that the deceased wanted to make a will. I am of the view that the failure to call them, an adverse inference under s. 114(g) of the Evidence Act 1950 should be invoked against the plaintiff.

In other words if they had been called as witnesses their evidence would have been unfavourable to the plaintiff.

The plaintiff in cross-examination stated that on 6 July 1993 at around 3.30pm to 4.00 p.m the plaintiff went to QEH and told the deceased that a lawyer (Mr. Ken Chiam (PW4)) would be coming to do the will. However the defendant in his evidence stated that on 6 July 1993 he came back to QEH at about 3.00 p.m. Lie Chin Moy who was there told him that she has just learnt that a lawyer was coming under the instruction of the plaintiff and Lie Chin Kwet to do a fresh will for the deceased. So the defendant went to the deceased and told her what he had learnt and asked her whether she had requested and instructed a lawyer to do a fresh will for her. He also asked her if she knew a lawyer was coming to QEH that afternoon and she said she has no knowledge of it.

In view of the conflict of evidence, it was incumbent for the plaintiff to call Lie Chin Moy as a witness. The failure to call her, an adverse inference under s. 114(g) of the Evidence Act 1950 arises against the plaintiff.

The learned Counsel for the defendant also submitted that another circumstance which goes to show that the deceased did not know or approve of the content of the will was the fact that when the deceased subsequently realised that the events which occurred was not her own doing she quickly made an *inter vivos* transfer of her remaining 10% shares in the company on 12 July 1993 so as to circumvent the provisions of the will. Since there is another suit pertaining to this *inter vivos* transfer. I did not take this submission into consideration.

Further, when the will was read and explained to the deceased by PW4 neither the plaintiff nor Lie Chin Kwet were present. There was also no evidence whether any other children of the deceased was present when PW4 read and explained the will to the deceased. Their presence would ensure that the deceased knew what she was doing. This is another circumstance that give rise to suspicion.

Further more the defendant was not challenged at all regarding his evidence in respect of the conduct of Lie Chin Kwet and the conduct of the plaintiff in respect of the loan of 20,000 Canadian dollars. DW3 was also not cross-examined at all in respect of his testimony of the loan of Canadian Dollars as told to him by the plaintiff.

I am of the view that there was suspicion surrounding the making of the will and that the suspicion must be removed by the plaintiff. In this case the plaintiff has failed to remove the suspicion. So on this ground the plaintiff must fail.

In view of the foregoing I therefore pronounce the will dated 6 July 1993 (P2) to be invalid. And I find that the will dated 2 October 1990 (AB2) has been proved and I pronounce it to be the true last will of the deceased.